COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

RE: Investigation into Compliance by)

Electric Companies with §196 of the) D.T.E. 98-77

Electric Restructuring Act of 1997)

)

COMMENTS OF ACTON, BEDFORD, FALMOUTH, LEXINGTON AND YARMOUTH

1. INTRODUCTION

On August 13, 1998, the Department of Telecommunications and Energy ("DTE" or "Department") issued its initial "Notice of Inquiry and Order Seeking Comments" ("NOI") regarding the provisions of Section 196 of the Electric Restructuring Act of 1996 (now codified as G.L. c. 164, §34A, and hereafter referred to as "Section 34A" or "§34A"). Section 34A requires electric companies to sell street lighting equipment to municipalities that wish to purchase that equipment. It further requires the Department to resolve disputes over the value of the equipment to be sold, the alternative tariff that should apply to a municipality that purchases its lighting equipment, or any other matter that arises in connection with §34A.

On August 16, 1999, almost one year to the day after the initial NOI, the DTE issued a "Request Seeking Comments" ("Request") that focuses specifically on the issue of pole attachment fees. In the Request, the Department cites two prior street lighting decisions[(1)] in which the Department enunciated the position that a utility company "may propose a fully allocated cost-based charge for municipal streetlight attachments in its next general rate case." Request, p. 1. In the Request, the Department solicited comments "regarding

the appropriateness, from a ratemaking perspective, of pole attachment fees in any alternative tariff pursuant to the Act." The Department also stated that "[c]omments filed on this issue may result in a change to the policy articulated in DTE 98-89."

The towns of Acton, Bedford, Falmouth, Lexington and Yarmouth (collectively, "Municipalities") offer these comments in response to the Request.[(2)]

1. **INTEREST OF THE MUNICIPALITIES**

Cities and towns that provide street lighting services within their borders usually do so by purchasing a complete package of services from their local utilities, pursuant to tariffs that include delivery of electrical energy, street lighting equipment, and related maintenance services.[(3)] In a small handful of instances, cities and towns own the street lights and merely purchase the electrical energy they need from the local distribution company or competitive suppliers.

The Towns of Falmouth and Yarmouth already own their street lights and save their taxpayers money by doing so. The lower electric rates commensurate with owning lights more than offset the added cost of maintaining and repairing the lights. Any decision by the Department regarding pole attachment fees would directly affect the interests of Falmouth and Yarmouth and their taxpayers.

The Towns of Acton and Lexington are on the verge of purchasing their street lights from Boston Edison Company ("Company"), having received a favorable ruling from the Department regarding calculation of the purchase price. *Petition of the Towns of Acton and Lexington*, DTE 98-89 (1998). They predict substantial savings for their taxpayers once the purchase is complete. They do not currently anticipate having to pay pole attachment fees to Boston Edison. Any policies or principles enunciated in this docket would affect the feasibility of these two towns' plans to own and operate their street lights.

The Town of Bedford is currently considering whether to purchase its street lights, weighing the estimated purchase price against the lower tariffs that would apply after ownership. Like Acton and Lexington, Bedford does not currently expect to pay any pole attachment fees, and any policies or principles enunciated in this docket would directly affect Bedford as well.

In order to protect their interests, many municipalities (including those joining in these comments) have previously filed comments both in this docket and in DTE 98-36, a docket addressing non-discriminatory access to utility poles. The municipal commenters consistently urge the Department not to allow utilities to impose pole attachment fees. See, for example, in DTE 98-36: "Comments of the Towns of Acton, Falmouth, Lexington and Yarmouth;"[(4)] January 20, 1999 letter from Gordon Feltman, Town of Bedford; January 15, 1999 letter from Catherine L. Salisbury, Southeastern Regional Services Group; January 21, 1999 letter from Geoffrey C. Beckwith, Massachusetts

Municipal Association; see also undated letter from Bay State Consultants for City of Haverhill in DTE 98-77. The Municipalities continue to oppose pole attachment fees.

1. **OVERVIEW OF G.L. c. 164, §34A**

In adopting §34A, the legislature incorporated the position of many municipalities that the Restructuring Act should provide clear legal authority for cities and towns to purchase their street lighting systems. The Act also is designed to provide municipalities the opportunity to reduce street lighting expenditures if they do purchase, as it includes provisions allowing a municipality to purchase the street lighting equipment at depreciated cost and requiring the utility to offer an alternative tariff that excludes equipment rental charges.

Regarding the specific issue of pole attachment rights and fees, §34A(a)(i) provides "for the use by such [purchasing] municipality of the space on any pole, lamp post, or other mounting surface previously used by the electric company for the mounting of the lighting equipment of the electric company." Municipalities have the absolute right to leave street lights attached to the same locations used by the electric company at the time of sale. Further, if the pole is jointly owned or used by any party other than the electric company, that third party "shall allow the municipality to assume the rights and obligations of the electric company with respect to such space." Section 34A(c). To the extent the electric company has the right to attach street lights to jointly-owned poles without making payment to the joint owner, §34A(c) gives a purchasing municipality the same right.

The legislature, through passage of §34A, intentionally conferred real benefits upon municipalities: the right to attach street lights to utility poles and the right to stand in the shoes of the electric company vis-a-vis any agreement with a third party regarding joint use or ownership of poles. The DTE should not allow any desire of utility companies to seek pole attachment fees to undercut the legislature's intent.[(5)]

1. SCOPE OF THE PROCEEDING

The Municipalities wish to emphasize the position previously articulated in the comments filed in this docket by the Cape Light Compact and the towns of Acton and Lexington that the Department has not stated any intent to adopt regulations as an outcome of this proceeding, and formal regulations therefore should not result from this proceeding. *See* G.L. c. 30A, §2 (regarding notice and hearing procedures for rulemaking). The Department also has not given any notice that it intends to adopt any ratemaking policies in this docket that would then bind parties to individual street lighting tariff cases. *See,* e.g., *Boston Gas v. DPU,* 405 Mass. 115,

121 (1989) (discussing various routes by which the Department may adopt "ratemaking principles" that have prospective effect). The Municipalities urge the Department to make formal decisions regarding pole attachment fees only in specific tariff or street lighting cases that raise the issue. Where, as seems to be the case, utilities themselves may take differing positions on whether pole attachment fees are appropriate and no company has formally sought approval of a tariff that includes such fees, the Department should postpone formal decisions until it is squarely presented with the issue.[(6)]

1. **THE DEPARTMENT SHOULD NOT AUTHORIZE POLE ATTACHMENT FEES**

The Municipalities welcome the Department's solicitation of further comments regarding "the appropriateness, from a ratemaking perspective, of pole attachment fees" and the apparent willingness of the Department to consider "a change in the policy articulated in DTE 98-89 and DTE 98-69" regarding those fees. Request, p. 2. The Municipalities oppose imposition of these fees for the several reasons stated below, and ask that the Department revoke the position previously articulated in DTE 98-89 and DTE 98-76 that pole attachment fees would be appropriate.

First, the utilities themselves are not actively seeking to impose these fees. See note 5, *supra.* In the absence of specific tariff filings from utilities, there is no reason the Municipalities can discern for the Department approving the concept that utilities should be allowed to recover pole attachment fees from municipalities. As the Department itself noted in DTE 98-89, p. 6-7, it would behoove all parties to resolve issues involving implementation of §34A without involving the Department. The Municipalities believe that utilities and individual cities or towns may agree, in many instances and without Department involvement, that pole attachment fees should not be imposed. The Department should not now preclude such outcomes.

Second, the Restructuring Act explicitly allows municipalities to succeed to the same arrangements that utility companies make with telephone companies regarding use of poles. G.L. c. 164, §34A(c). Those arrangements usually allow the utility free access to poles owned by (or jointly owned with) the telephone company. Wherever such arrangements exist, cities and towns have the right to free pole placements. The Department may not alter this legislative mandate even if it believes the mandate to be inconsistent with its own ratemaking views. *See Commonwealth v. Johnson Wholesale Perfume Co., Inc.*, 304 Mass. 452, 457 (1939) ("When a subject has been fully regulated by statute an administrative board cannot further regulate it by adoption of a regulation which is repugnant to the statute.")

Third, municipalities have a unique relationship with distribution companies compared to other parties that make pole attachments.[(7)] The distribution companies enjoy the right to place poles in public streets and ways solely through grants made by cities and towns.[(8)] G.L. c. 166, §22. Municipalities grant these companies the right to place their poles in public ways in order to give the public

access to the companies' distribution systems and enjoy the benefits of a supply of electricity. At the time of making these grants, municipalities may require the company to place fire alarm or other municipal wires on the poles at no charge. *Postal Telegraph Cable Co. v. Chicopee*, 207 Mass. 341, 344, 347 (1911). Even after the grants are made, municipalities continue to own the land upon which the poles are placed and have the obligation and expense of maintaining it. The poles increase the municipalities' expenses by making it more difficult to mow any grass in the right-of-way or to operate street-cleaning or snow removal equipment without hindrance. It is simply bad public policy to allow companies to charge municipalities for attachments on poles originally placed on public property by permission of the municipality itself, especially as there is no marginal or incremental cost to the company in allowing a street light to remain attached to a pole.

Applying concepts more traditionally used in ratemaking cases to the question of pole attachment fees, street lights are often placed in what is otherwise non-usable space that could not produce revenues for the utility: locations where the utility would not allow cable or other attachments.[(9)] DTE 98-76, Anundson Testimony, pp. 5 - 6. If existing street lights are in non-usable space, there is no need to charge attachment fees.

Fourth, municipalities have inherent power to impose annual lease-type fees on utilities since pole placements burden the municipal property interest in the right-of-way. *See, e.g. City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 13 S. Ct. 485, 488 (1893) (in granting "permission to a telegraph company to occupy the streets" municipality "has a right to exact compensation" in the nature of an annual rental fee); *Western Union Telegraph Co. v. City of Richmond*, 224 U.S. 160, 169-171 (1912) (federal legislation allowing stringing of lines "assumes that they [the rights of the municipality] are such as to authorize the charge of a reasonable rental"); *compare Postal Telegraph Cable Co. v. Chicopee*, 207 Mass. 341, 347-350 (1911) (city may require utility to string its fire alarm and municipal light wires for free, as condition of obtaining pole placements). Municipalities also have the right to charge reasonable application fees whenever a utility seeks permission to place poles or string new lines under G.L. c. 166, §22. *See,* e.g., *Boston Gas Company v. City of Newton*, 425 Mass. 697, 706 (1997). Few if any municipalities impose annual rental fees, and most municipalities could recover larger application fees because they either charge nothing or less than the case law allows. If the Department allows utilities to impose attachment fees, this will give municipalities reason to aggressively review the current level of their application fees or seek to impose annual rental fees. This scenario is not in any party's best interest, and the Department should avoid this outcome.

1. **CONCLUSION**

The legislature, by passing Section 34A, conferred broad and advantageous rights upon municipalities to purchase and operate their street lighting systems. The legislature explicitly gives municipalities the right to attach street lights they own at

the same locations previously used by the local utility, and the right to succeed to any rights the utility company may have to make attachments for free if the pole is jointly owned by a third party. No utility company is presently seeking approval of an alternative street lighting tariff that includes a pole attachment fee. There is thus no reason for the Department to formally decide now whether pole attachment fees are appropriate. However, because the Department has previously stated that utilities may seek pole attachment fees in future general rate cases, the Municipalities urge the Department to revoke those policy statements and defer a formal decision on this issue until it is presented by a tariff or street lighting filing.

Dated: August 27, 1999 Respectfully submitted,

Town of Acton

Town of Bedford

Town of Falmouth

Town of Lexington

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1. *Petition of the Towns of Acton and Lexington*, DTE 98-89, at 6 (1998) and *Massachusetts Electric Company*, DTE 98-69, at 19 (1999).

2. Acton and Lexington, in conjunction with the Cape Light Compact, filed comments in response to the August 13, 1998 Notice of Inquiry and Order Seeking Comments.

3. For example, see Boston Edison Company's S-1 rate, under which the Company "will furnish, install, own and maintain street lighting facilities."

4. These comments are appended as Attachment A, and are incorporated by reference herein.

5. Notably, the two companies that face the most active municipal purchase efforts are not seeking to impose pole attachment fees at the present time. Massachusetts Electric Company ("MECo"), in response to Haverhill's purchase plans, did not initially seek pole attachment fees because "street lights... generally do not impose a burden on usable space on a pole." "Proposed Purchase Price Methodology," Testimony of G. Paul Anundson, p. 5, DTE 98-76 (July 7, 1998). However, in light of the Department's decision in DTE 98-89 (n. 1, *supra)*, MECo stated its intent to file for pole attachment fees in its next general rate case. Boston Edison, in response to the purchase plans of Acton and Bedford, also does not seek pole attachment fees in its alternative tariff. See proposed S-2 tariff, MDTE 909, filed August 25, 1999 with the DTE.

6. The Municipalities, however, do not question the value of the Department soliciting comments on the question of pole attachment fees. Section 34A is still very new and few municipalities have used it. It benefits both municipalities and utilities for the Department to solicit, in a public forum, the parties' respective views and to provide parties guidance on the Department's interpretation of §34A.

7. In this regard, see the comments of Acton, Falmouth, Lexington and Yarmouth in DTE 98-36 (appended as Attachment A), distinguishing the different relationships that municipalities and third-party attachers such as cable companies have with utilities.

8. The New Hampshire Supreme Court recently held that the granting by a municipality of permission to string lines allows the municipality to impose real estate taxes on the utility's use of municipally-owned land. *New England Tel. & Tel. Co. v. City of Rochester*, No. 97-647, slip op. (Aug. 6, 1999) (available at www.state.nh.us/supreme/opinions/9908/nett.htm).

9. In DTE 98-89, p. 6, the Department cited *A-R Cable Services, Inc. et al*, DTE 98-52 (1998) for the proposition "that street lighting equipment is within the usable space" on a pole. However, no city or town participated in DTE 98-52 and the question of

whether pole attachment fees should be imposed on municipalities was simply not before the Department. The Department should not mechanically impose the holding of *A-R Cable*, regarding the meaning of "usable space" in G.L. c. 166, §25A, on municipalities seeking an interpretation of their rights under §34A. Notably, in *Greater Media One, Inc. v. DPU*, 415 Mass. 409, 416-417 (1993), the only appellate case interpreting §25A, the court highlighted the arrangement under which the telephone company reserved free conduit space for municipal uses.